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Supreme Court of the United States

OCTOBER TERM, 1945

No. 35

ASBURY HOSPITAL, A CORPORATION
APPELLANT,

-vs.-

CASS COUNTY, NORTH DAKOTA, A PUBLIC CORPORATION, ET AL.
APPELLEES.

BRIEF OF APPELLEES

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INDEX

	Page
Jurisdiction	1, 2
Statement of Case	2
Argument	2
Points Stated	2
Point I	3
Point II	38
Conclusion	40

TABLE OF AUTHORITIES CITED

CASES

Alpena Portland Cement Co. vs. Jenkins & R. Co., 244 Ill. 354; 91 N. E. 480 24

Asbury Hospital vs. Cass County, et al., 72 N. D. 359; 7 N. W. 2d 438 ..... 19, 23, 27, 36, 39

Baltic Min. Co. vs. Massachusetts, 231 U. S. 68; 58 L. ed 127 7

Buchanan vs. Warley, 245 U. S. 60; 62 L. ed. 149 7

Chicago, Milwaukee & St. Paul R. Co. v. Wisc., 238 U. S. 491; 59 L. ed. 1423 ..... 8, 10

Church of Jesus Christ of L. D. S. vs. United States, 136 U. S. 1; 34 L. ed. 478 28

Crescent Cotton Oil Co. vs. Miss.; 257 U. S. 129; 66 L. ed. 166 ..... 5, 7, 19

Floyd vs. Perrin, 30 S. C. 1; 8 S. E. 14 25

Friedlander Bros. vs. Deal, 218 Ala. 245; 118 So. 508 24

General Co. ference vs. Berkey, 156 Cal. 466; 105 P. 411 ..... 23, 24

German Alliance Ins. Co. vs. Lewis 233 U. S. 389; 58 L. ed. 1011 37

Gilman vs. Tucker, 128 N. Y. 190; 28 N. E. 1040 ..... 9, 12

Greenwood vs. Union Freight R. Co., 105 U. S. (15 Otto) 19; 26 L. ed. 964 28

Hammond Packing Co. v. Arkansas, 212 U. S. 322; 53 L. ed. 530 7

Page

Henneford vs. Silas Mason Co. 300 U. S. 577; 81 L. ed. 814 .. 35

Herndon vs. Chicago Rock Island Pac. Ry. Co., 218 U. S. 135; 54 L. ed. 970 .. 39

Horn Silver Min. Co. vs. New York, 143 U. S. 305; 36 L. ed. 164 .. 6, 7

Lommen vs. Minnesota Gaslight Co., 65 Minn. 196; 68 N. W. 53 .. 29

Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 572; 79 L. ed. 1593 .. 14, 15

Major Creek Lumber Co. vs. Johnson, 99 Or. 172; 195 P. 177 .. 23, 24

Minot Special School Dist. vs. Olsness, 53 N. D. 683; 208 N. W. 968 .. 35

Mulford vs. Curry, 163 Cal. 276; 125 Pac. 236 .. 9, 13

National Council vs. State Council, 203 U. S. 151; 51 L. ed 132 .. 19

Ochoa vs. Morales, 230 U. S. 139; 57 L. ed. 1427 .. 7, 9

Orient Ins. Co. vs. Daggs, 172 U. S. 557; 43 L. ed. 552 .. 2, 38, 39, 40

Ozan Lumber Co. vs. Union County Nat. Bank, 202 U. S. 623; 50 L. ed. 1176 .. 37

Paul vs. Virginia, 8 Wall (75 U. S.) 168, 19 L. ed. 357 .. 17

Phillips Petroleum Co. vs. Jenkins, 297 U. S. 629, 80 L. ed. 943 .. 19

Premier, Pabst Sales Co. vs. Grosscup, 298 U. S. 226, 80 L. ed. 1155 .. 35, 36

Rindge Co. vs. Los Angeles County, 262 U. S. 700; 67 L. ed. 1186 .. 35

Spann vs. Dallas, 111 Tex. 350; 235 S. W. 513 .. 8, 9

State ex rel. Linde vs. Taylor, 33 N. D. 76, 156 N. W. 561 .. 29

State vs. Neff, 52 Ohio St. 375; 40 N. E. 720 .. 8, 9, 11

Union Nat. Bank vs. Matthews, 98 U. S. 621; 25 L. ed. 188 .. 20

Waters-Pierce Oil Co. vs. Texas, 177 U. S. 28; 44 L. ed. 657 .. 2, 40

Western Union Tel. Co. vs. Kansas, 216 U. S. 1; 54 L. ed. 355 .. 8, 10, 39

Wright vs. Union Central Life Ins. Co., 311 U. S. 276; 85 L. ed. 184 .. 15

CONSTITUTION AND STATUTES

	Page
United States Constitution:	
Section 1, Article 14	2
Section 2, Article 4	1, 39
Section 10, Article 1	2, 38, 39, 41
Fourteenth Amendment	7, 11, 21, 39, 41
United States Code:	
Section 237a	1, 2
North Dakota Constitution:	
Section 131	3, 17
Section 136	3
Section 137	4
North Dakota Revised Code of 1943:	
Chapter 10-02	35
Section 10-0601	33
Section 10-0602	16, 32
Section 10-0603	16, 32
Section 10-0604	34
Section 10-0605	16, 32
Chapter 10-15	35
Miscellaneous:	
11 Am. Jur. 803	29
12 Am. Jur. 100	2, 40
13 Am. Jur. 234	4
19 Am. Jur. 399	27
23 Am. Jur. 223	19
23 Am. Jur. 224	5, 18, 19
23 Am. Jur. 259	2, 40
1 Cooley, Const. Lim. 8th ed. p. 345	29
16 C.J.S. 161	35, 36
16 C. J. S. 471	29
20 C. J. S. 12	4
20 C. J. S. 30	5
20 C. J. S. 31	18, 19
20 C. J. S. 32	5
6 Fletcher, Cyc. Corp. 170, Sec. 2475	23
6 Fletcher, Cyc. Corp. 681, Sec. 2802	21
8 Fletcher, Cyc. Corp. 449	2, 40
17 Fletcher, Cyc. Corp. 471	23, 24
17 Fletcher, Cyc. Corp. 797	18, 19

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BRIEF OF APPELLEES

JURISDICTION

The appellant predicates jurisdiction of the Supreme Court of the United States upon Section 237a (U. S. Code), which provides that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had ******** where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error.

It is well settled that a corporation is not a citizen within the meaning of Section 2 of Article 4 of the

Constitution of the United States, or of Section 1 of Article 14 of the Amendments to the Constitution, as to privileges and immunities of citizens. Orient Ins. Co. v. Daggs, 172 U. S. 557; 43 L. ed. 552; Waters Pierce Oil Co. v. Texas, 177 U. S. 28; 44 L. ed. 657; 12 Am. Jur. 100; 23 Am. Jur. 259; 8 Fletcher, Cyc. Corp. 449.

The Appellees contend, therefore, that the facts alleged in the appellant's bill of complaint, and which are admitted by the demurrer of the appellees, establish that the issues raised thereby are not of such character as would bring them within the provisions of Section 237a (U. S. Code). The theory of the appellees upon the question of jurisdiction will be developed and considered in the course of the argument in our brief.

STATEMENT OF THE CASE

The statement of the case in appellant's brief is substantially correct, and, therefore, we do not deem it necessary to make a further statement here.

ARGUMENT

Appellant bases its argument for reversal of the decision of the court below upon two main points:

I. As applied to appellant's property acquired before the passage of the corporation farm land act, the legislation is in contravention of the 14th Amendment.

II. The legislation impairs the obligation of contract within the meaning of Article 1, Section 10 of the Constitution of the United States.

We shall consider these points in their order.

Briefly stated, the challenged act provides: Corporations which acquired farm lands in the state of North

Dakota prior to its effective date must sell or dispose of same within ten years after said date, but may farm the land during the ten year period.

Corporations, domestic or foreign, acquiring land in the state in any manner since the approval and adoption of said act are subject to all the provisions thereof; that is, they must dispose of the land within ten years after acquisition thereof, whether such lands were acquired by judicial process, operation of law or in any other manner.

If lands are not disposed of within said ten year period, the county is required to bring action for the escheat of the title, and within one year sell the land to the highest bidder, and the proceeds paid to the corporation, less the costs and expenses of sale.

Corporations may retain such lands as are necessary in carrying on their business.

The act does not apply to cooperative corporations if 75 per cent of the members are farmers or principally dependent upon farming for their livelihood.

POINT I

Appellant's first contention under Point I is that the requirement that it must dispose of its property within ten years is an infringement upon vested property rights. Section 131 of the Constitution of the State of North Dakota provides that, "the legislative assembly shall provide by general laws for the organization of all corporations hereafter to be created, and any such law, so passed, shall be subject to future repeal or alteration."

Section 136 of the Constitution of North Dakota provides that, "No foreign corporation shall do busi-

ness in this state without having one or more places of business and an authorized agent or agents in the same, upon whom process may be served."

Section 137 of the Constitution of North Dakota provides that, "No corporation shall engage in any business other than that expressly authorized in its charter."

The appellant is a foreign corporation organized under the laws of the state of Minnesota. It is created and exists for charitable and religious purposes solely. It is purely a Minnesota corporation and has no right to do business in the state of North Dakota. It is true that it acquired certain real property in the state of North Dakota, but it did so by sufferance and not because it had any rights under its Minnesota charter to do so. When it acquired this property in North Dakota, it did so subject to the right of this state to assert its reserved power whenever it saw fit so to do. The appellant certainly had no greater right or privilege than corporations organized under the laws and Constitution of North Dakota.

"Corporations are the creations of the state endowed with such faculties as the state bestows and subject to such conditions as the state imposes." 13 Am. Jur. 234.

"A corporation can have no legal existence beyond the bounds of the state or sovereignty which created it, and although it may act in another state or country, it cannot do so as a legal or constitutional right, but only by the comity or consent of such state or country." 20 C. J. S. 12.

Appellant's charter was granted by the state of Minnesota and it exists solely for religious and charitable purposes. There is no charter nor contract between

appellant and the state of North Dakota. The fact that appellant happened to acquire land in North Dakota does not establish a contract with, or an obligation upon, North Dakota. The only implied right that the appellant could have with respect to land was to acquire and hold only so much as was necessary to the conduct of the business authorized by its charter, and such business could not be conducted in North Dakota without first complying with the laws governing admission into the state of foreign corporations. It is conceded that the appellant never complied with, or attempted to comply with such provisions.

The fact that the North Dakota law is held to apply to appellant does not infringe upon any of its vested rights, since it has none in the state. Subject to constitutional limitations that a state cannot exclude a corporation engaged in interstate commerce, or is a corporation that is an agency or instrumentality of the Federal government, a state may prohibit foreign corporations from doing business therein, or it may make the right to do business therein depend upon such terms and conditions as it may in its discretion see fit to impose. 20 C. J. S. 30; 23 Am. Jur. 224; Crescent Cotton Oil Co. v. Miss. 257 U. S. 129; 66 L. ed 166; 20 C. J. S. 32.

In the case of Crescent Oil Co. v. Miss. supra, a law enacted by the state of Mississippi designated as "Anti-Gin Act" was upheld by the Supreme Court of the United States. It prohibited corporations, whether organized under the laws of that state or authorized under the laws thereof, to do any local business therein, among other things, from owning or operating any cotton gin when such corporation was interested in the manufacture of cotton-seed oil or cotton-seed meal. A

penalty was provided for violation of the act, but corporations were permitted to operate their gins for a reasonable time until they might be sold.

The plaintiff in error, a corporation, organized under the laws of Tennessee, prior to the enactment of said Anti-Gin Act owned and operated a cotton-seed oil mill at Memphis and two cotton gins in Mississippi. Disregarding the Anti-Gin Act it continued to operate its two gins in Mississippi until 1915, when, for the purpose of enforcing the law, the state on the relation of its Attorney General instituted a suit in equity against the company in the county court of chancery, which resulted in a decree that the act was constitutional and that the plaintiff in error was guilty of violating it.

The plaintiff in error contended that the statute was unconstitutional in that it imposed a direct and substantial, and therefore an unconstitutional burden upon an instrumentality of interstate commerce, and that it was applicable to corporations and not to individuals owning and operating cotton gins, and that therefore it denied the plaintiff in error the equal protection of the law. In the opinion of Justice Clarke, we find the following statement:

> "Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a state, and where, as here, no contract right is involved, and there is no employment by the Federal government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. Horn

Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133, 34 Sup. Ct. Rep. 15, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions applicable to corporations only. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 343, 344, 53 L. ed. 530, 541, 542, 29 Sup. Ct. Rep. 370; Baltic Min. Co. v. Massachusetts, supra."

We quote further from paragraph 6 of the syllabus:

"Any classification adopted by a state in the exercise of its police power to prevent a practice conceived to be promotive of monopoly, with its attendant evils, and which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of U. S. Const., 14th Amend., and every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed."

We submit that the holding in the Crescent Oil Co. v. Miss., supra, supports the contention of the appellees as to the validity of the North Dakota corporation farm act.

Counsel for appellant cites the case of Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, and quotes from the opinion of Justice Day as supporting appellant's contention that the North Dakota law is violative of the 14th Amendment. That case, however, is not in point

since it was decided on an entirely different state of facts from those presented in the case at bar.

The city of Louisville, Kentucky, passed an ordinance which provided, among other things, that it shall be unlawful for any colored person to move into and occupy as a residence, place of abode or to establish and maintain a place of public assembly, any house upon any block upon which a greater number of houses are occupied as residences, places of abode or places of assembly by white people than are occupied as residences, places of abode or places of public assembly by colored people.

Buchanan, the plaintiff in error, a colored person, had entered into a contract with the defendant, in error, Warley, for the purchase of certain real estate in a block in which the greater number of residents were white people. The defendant in error refused to convey, basing his refusal upon the ordinance quoted, and the plaintiff in error brought action for specific performance. The Kentucky court upheld the validity of the ordinance, but an appeal to this court was taken and the judgment of the Kentucky court was reversed.

As will be observed, the controversy in this case did not turn upon the right of corporations to hold property, but upon the right of natural persons. The case, therefore, is of no value in determining issues involved here.

Counsel for appellant also cites the following cases:

Spann v. Dallas, 111 Tex. 350, 235 S. W. 513; Ochoa v. Morales, 230 U. S. 139, 57 L. ed. 1427; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355; Chicago, Milwaukee & St. Paul R. Co. v. Wisc., 238 U. S. 491, 59 L. ed. 1423; State v. Neff, 52 Ohio St. 375, 40

N. E. 720; Gilman v. Tucker, 128 N. Y. 190, 28 N. E. 1040; Mulford v. Curry, 163 Cal. 276, 125 Pac. 236.

We are in agreement with the principles announced in the foregoing cited cases, but the facts are neither analogous to nor parallel with the facts in the case at bar.

The case of Spann v. Dallas, supra, involved the validity of a city ordinance prohibiting the owners of land or lots from constructing certain buildings thereon, except upon the consent of three-fourths of property owners owning property within the district and upon approval of the design of the building by the building inspector. Under said ordinance, no rule, no standard or no regulation of any kind was given whereby an applicant for a building permit may know to what particular design or building he must conform. If the design, whatever its merits, did not suit the inspector, it was within his uncontrolled power to prohibit the building. The courts of Texas upheld the validity of the ordinance, but the judgment was reversed by this court. The ordinance was held void in that it left the right to construct a building subject to the caprice or arbitrary discretion of the inspector.

In the case of Ochoa v. Morales, supra, one Rai Mundo Morales, natural grandfather of the complainants in the case, had fraudulently gained title and possession of certain premises in Porto Rico. He mortgaged the premises to Ochoa and thereafter transferred the property to the mortgagee in satisfaction of the mortgage debt. The persons legally entitled to the property brought an action in the courts of Porto Rico to set aside the transfer on the ground of fraud, and judgment was entered in their favor. The case was appealed to the Supreme Court of the United States, where the

judgment was affirmed. As will be seen, the facts are entirely different from the facts in the case at bar, and the decision in the case certainly cannot be considered as an authority for appellant.

The issue in the case of Western Union Telegraph Co. v. Kansas, supra, was as to the validity of a Kansas statute which provided that each corporation authorized to do business in the state, before filing its charter with the Secretary of State, was required to pay the State Treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of 1/10 of 1 per cent of its authorized capital, upon the first $100,000 of its capital stock, or any part thereof; and upon the next $400,000, or any part thereof, 1/20 of 1 per cent; and for each million or major part thereof over and above the sum of $500,000, $200. The statute also provided that failure to make such payment shall work a forfeiture of the right of the corporation to do business in the state. Under the provisions of said statute, a foreign corporation was prohibited from doing business in the state, unless it first paid into the state school fund a tax of a certain percentage of its capital representing all of its business, property and interests not only in the state of Kansas, but in every other state where the company did business. It was therefore a tax and burden upon interstate commerce and was held to be in violation of the commerce clause of the Constitution of the United States. As may readily be seen, the decision in that case is no authority for the contention of the appellant in the case at bar.

In the case of Chicago, Milwaukee & St. Paul R. Co. v. Wisc., supra, a statute was challenged which prohibited the letting down of an unengaged and unoccupied upper berth in a sleeping car when the lower

berth in the same section was occupied, and provided a penalty for violation thereof. The statute was upheld by the Supreme Court of the state of Wisconsin, but reversed by the United States Supreme Court as being contrary to the due process clause of the 14th Amendment to the United States Constitution.

We see no parallel between the purpose and intent of the Wisconsin law and the North Dakota corporation farming statute.

The case of State ex rel. White v. Neff, supra, cited by counsel for appellant, arose out of an entirely different state of facts than those involved in the case at bar. Cincinnati college was a college corporation created by the laws of the state of Ohio with perpetual succession. The funds or stock of said college consisted of 5000 shares at $25 each. The directors of the college were elected by the stockholders for specified terms. The college as such had such powers as is ordinarily enjoyed by institutions of that nature.

After the establishment of Cincinnati college, the legislative assembly of the state of Ohio in 1892 enacted a statute transferring the control and management of Cincinnati college to the directors of the University of Cincinnati. The question involved and the issue raised was as to whether or not this statute was in conflict with Section 19 of Article 1 of the Constitution of the state of Ohio, which provided that, "Private property shall ever be held inviolate." The effect of the Ohio statute of 1892 was to take the property of Cincinnati college and donate it to the University of Cincinnati.

The Supreme Court of Ohio held that the result of the statute passed April 15, 1892, relating to the Cincinnati

college, which in terms gives absolute control and management of the affairs and property of Cincinnati college to the directors of the University of Cincinnati, is to take the property of the former and donate it to the latter institution. The statute, therefore, was in conflict with Section 19 of Article 1 of the Constitution of the state of Ohio, and was therefore void.

The effect of the Ohio statute which was held to be void was deliberately to seize the property of one corporation without any compensation and donate it to another corporation. There is, of course, no similarity between the facts and the issues in that case and the facts and the issues of the case at bar.

The case of Gilman v. Tucker, supra, cited by counsel for appellant, is not in point. The question involved in that case was as to the validity of a statute of the state of New York relative to the sale and redemption of real property, sold on execution, which provided that if the title of the grantee in the sheriff's deed, executed in pursuance of the sale, or his assignees, is adjudged to be void in any action for that purpose brought by the judgment debtor, such judgment shall have no effect unless, within twenty days after the entry of such judgment, the plaintiff shall pay to such grantee, or his assigns, the sum which was paid on the sale, with interest, including the costs and expenses of the defendant in defending the action in which such judgment was recovered, and on failure to make such payment, title shall be valid in the grantee.

In other words, said statute would compel a judgment debtor to pay the expenses of sale as well as the purchase price at the sale, notwithstanding such sale was had under a judgment which was in fact null and

void and of no effect. It was, therefore, held that the enforcement of such a statute would be taking of property without due process of law.

The case of Mulford v. Curry, supra, involved the validity of a California statute entitled, "An act relating to revenue and taxation, providing for a license tax upon corporations." It provided that it shall be the duty of every corporation incorporated under the laws of this state, and of every foreign corporation now doing business, or which shall hereafter engage in business in this state, to procure annually from the Secretary of State a license authorizing the transaction of such business in this state, and shall pay therefor a license tax as follows: When the authorized capital stock does not exceed $10,000, the tax shall be $10. The fee then increases progressively, and when the stock is five million dollars, the tax shall be $200, and when the capital stock exceeds five million dollars, the tax shall be $250. The Supreme Court of California took original jurisdiction in a suit for mandamus brought by the plaintiff corporation against the Secretary of State to compel him to receive and file a certain document, designating and appointing an agent of the corporation upon whom process might be served, but without payment of the tax. Payment of the tax was refused on the ground that it was a tax upon the property of the corporation not only in the state of California but upon its property in every state in which it did business, and that, therefore, it was a burden upon interstate commerce. The Supreme Court of California granted the petition of the corporation and issued the writ on the ground that the tax and fee so to be collected by the state was an illegal interference with interstate commerce.

Appellant relies upon the case of Louisville Joint Stock Land Bank v. Radford, 295 U. S. 572, 79 L. ed. 1593, which held unconstitutional the so-called "Frazier-Lemke Act of June 28, 1934". Appellees submit, however, that the case is not in point here. Justice Brandeis, who wrote the opinion in that case, analyzed the statute involved as follows:

> "1. The right to retain the lien until the indebtedness thereby secured is paid.
>
> 2. The right to realize upon the security by a judicial public sale.
>
> 3. The right to determine when such sale shall be held, subject only to the discretion of the court.
>
> 4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.
>
> 5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

It will be readily observed that there is no parallel between the issues involved in the Radford case, supra, and in the case at bar since the appellant is entitled to the proceeds of the sale of the land involved.

As to the right to determine when such sale shall be held under the statute involved, such sale must be had within one year after the escheat judgment and, therefore, it cannot be successfully maintained that the

plaintiff will be prejudiced by an unreasonable length of time before it may realize upon the proceeds of the sale.

There is nothing in the North Dakota law which prohibits the corporation involved from being a bidder at the sale under the escheat judgment, and, therefore, it may protect its rights and prevent a sale of the land at the price less than what, in the judgment of the corporation, is its value.

As to the rents and profits, if any there be, during the escheat proceedings, as we have pointed out, the court will undoubtedly require an accounting thereof to be made to the corporation.

We submit, therefore, that the case of Louisville Joint Stock Land Bank v. Radford, supra, is not in point and does not support appellant's theory in the case at bar.

The appraisal of land through judicial proceedings at the price less than the amount of the indebtedness for which such land stands as security does not constitute taking of property without due process of law.

In the case of Wright v. Union Central Life Ins. Co. 311 U. S. 276, 85 L. ed. 184, involving the validity of the Frazier-Lemke Act (Sec. 75s of the Bankruptcy Act), this court held that a debtor who had availed himself of the provisions of the act was entitled to have the property reappraised or the value fixed by the court upon a hearing, and that the value having been determined at such hearing, he was then entitled to a reasonable time, fixed by the court, in which to redeem at such reappraised value, fixed by the court, and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted.

While the case is not directly in point, yet we submit that the principle announced supports the theory of the appellees in this case, and that a public sale as provided by the North Dakota statute is not violative of the constitutional rights of the appellant.

The appellant acquired certain real property in North Dakota prior to July 29, 1932, which is the effective date of the statute challenged. The appellant and all corporations, domestic or foreign, which acquired land in North Dakota prior to July 29, 1932 are required to sell or dispose of same within ten years after the effective date of the act, except such land as is reasonably necessary in the conduct of their business. (Section 10-0602 of the North Dakota Revised Code of 1943.)

Section 10-0603 of the act provides that any corporation, either domestic or foreign, which, on or since July 29, 1932, has acquired or hereafter shall acquire any rural real estate, used or usable for farming or agriculture, by judicial process or operation of law shall dispose of such real estate, except such as is reasonably necessary in the conduct of its business, within ten years from the date that it was so acquired. During said ten year period the corporations may farm and use such lands for agricultural purposes.

Section 10-0605 of the act provides that the title and ownership to any real estate acquired in any manner by any domestic or foreign corporation since the approval and adoption of the initiated law of June 29, 1932 shall be valid for all purposes, notwithstanding any provisions in said initiated law contained, subject, however, to all of the provisions now contained in this chapter.

When the appellant acquired land in the state of North Dakota, it did so not as a matter of right, but through comity or acquiescence, or under a license without consideration, and acquired no rights binding upon the state. Whatever rights it may have acquired were subject to the constitutional and statutory provisions of the state. It was bound to take notice of the constitutional provisions and reserved power of the state. It had constructive notice of Section 131 of the Constitution of North Dakota, which provides that the legislative assembly shall provide by general law for the organization of all corporations hereafter to be created, and any such law, so passed, shall be subject to future repeal or alteration. The appellant, therefore, had constructive notice that the legislative assembly of the state of North Dakota, under the provision of the Constitution quoted, had the power to pass any law regulating and controlling the activities of corporations, domestic and foreign, and might prohibit them from doing business in the state so far as such prohibition was not violative of the Federal Constitution.

As was said in the case of Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357:

> "The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta vs. Earle, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of

its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And then also:

"'A foreign corporation doing business in a State through comity or acquiescence, or under a license given without valuable consideration, has no contract binding the State not to exercise its powers to exclude it.' 23 Am. Jur. 224, see also 20 CJS pp. 31 et seq.; 17 Fletcher, Cyc. Corp. pp. 797 et seq. In such case, the state may repeal at any time a statute granting permission to do such business, and may withdraw or revoke such license, and may withdraw its implied consent to a foreign corporation which has been allowed on principles of comity to engage in business therein without express permission and may evict such corporation, provided its action does not operate to deprive the corporation of its property without due process, obstruct or burden 'interstate or foreign commerce, or impede business conducted by Federal authority.' 23 Am.

Jur. 224, 225; 17 Fletcher, Cyc. Corp. pp. 797, 798; 20 CJS pp. 31 et seq.; National Council vs. State Council, 203 US 151, 51 L. ed. 132, 27 S. Ct. 46; Crescent Cotton Oil Co. vs. Mississippi, supra."

We quote also from the case of Asbury Hospital v. Cass County, et al., supra, (R. 46); 23 Am. Jur. 223:

> "Of course, where a foreign corporation is admitted to a State, not as a mere licensee, but upon terms and conditions which create a contract between the corporation and the state, the state may not impair the obligations of such contract. But, even where there may be said to be a contract between the state and a foreign corporation, the State may have reserved the power to alter the conditions on which the corporation is permitted to do business, or to revoke the right to do business in the State at all."

It is true that the reserved power of the state to amend corporate charters is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, to take property without compensation, or arbitrarily to make alterations that are inconsistent with the scope and object of a charter, but the provision of the Federal Constitution which prohibits states from passing any law impairing contract obligations does not preclude a state which has reserved power to alter the charter of a corporation from doing so. Phillips Petroleum Co. v. Jenkins, 297 U. S. 629, 80 L. ed. 943.

In the case of Phillips Pet. Co. v. Jenkins, supra, the appellant complained that a statute of the state of Arkansas made corporations liable for personal in-

juries sustained by an employee, through negligence of another employee, while as to individual employers, it left in force the common law rule that every servant assumes the risk of injuries through the negligence of his fellow servants. In the opinion of this court, written by Mr. Justice Butler, we find the following:

> "Arkansas might have refrained from enactment of statutes creating or authorizing organization of corporations and might have denied to foreign corporations admission to the State. But it may not enforce any part of the charter of a domestic corporation or any provision of its laws relating to admission of a foreign corporation that is repugnant to the Federal Constitution. If Sec. 7137 is repugnant to the equal protection clause, it is without force as a part of the charter contract or otherwise."

Statutes prohibiting corporations from holding real estate, or restricting the holding thereof to a certain number of years, are not new. The National Banking Act, 12 U. S. C. A. 29, as amended, prohibits national banks from holding real estate more than five years. In the opinion of the United States Supreme Court in the case of Union National Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188, we find the following:

> "The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter of the statute, constitutes the law."

In Vol. 6, Fletcher Cyc. Corp., page 681, Sec. 2802, we find the following general statement:

> "The quantity of real property which a corporation may purchase or hold is sometimes expressly limited to that which is reasonably necessary to its corporate purposes. Very often, too, there are provisions in the constitutions or statutes which directly or by necessary implication require surplus or unnecessary property to be disposed of by the corporation, within a fixed period of time, such as five years, or six years, or ten years, or some other designated number of years. Such provisions are apparently designed to prevent accumulations of real property by corporations and in this respect are akin to the early English statutes of mortmain. They cannot be evaded by causing the title to be taken by a dummy corporation. Real property is held by a corporation in violation of such prohibitions where it is taken by the company with the fixed purpose and intention of being held as an investment, and not to be employed in a necessary or proper use in carrying on the business of the corporation."

We submit that the North Dakota statute challenged by the appellant is not violative of the 14th Amendment to the Constitution of the United States. It is conceded that the land acquired by the appellant in the state of North Dakota was acquired in 1925 for investment solely. Under the statute, it was given ten years from the effective date of the Act in which to sell or dispose of the property. During that time it could dispose of the property in the open market, and the presumption is that at a public sale it would bring its

market value. Ten years certainly would be a reasonable time under all of the circumstances in which to dispose of the property. It is difficult to conceive that a loss could be sustained since the property was first acquired through an assignment to the appellant of a real estate mortgage. When a loan is made upon a parcel of land, as a general rule the loan is conservative when compared with the value of the land, and usually does not exceed fifty per cent of its value, and it certainly may be assumed that at a public sale the land would bring at least the amount that the appellant had invested therein. We submit, therefore, that there is no force to appellant's argument that when it was compelled to sell its property within ten years it was thereby deprived of the right to determine when or what price, or to whom the property might be sold, because, as has been pointed out and conceded, it is held merely as an investment in the first instance. It would seem clear, therefore, that the state, under its reserved power, had the constitutional right to fix a reasonable time within which the appellant, and other corporations similarly situated, should dispose of their real estate holdings in the state.

The appellant contends that since it was authorized under its articles of incorporation to acquire and hold real property, the land in question falls within the exception in the North Dakota statute authorizing corporations to continue to hold such real estate as is reasonably necessary in the conduct of their business.

As we have pointed out, the appellant is a Minnesota corporation, and its charter was granted by that state. It acquired land in this state through comity or acquiescence. Even if the exception of the North Dakota law should apply; namely, that it may hold such real estate

as is reasonably necessary in the conduct of its business, it cannot be successfully maintained that real estate acquired in this state for the purpose of investment is reasonably necessary in the conduct of its business. On the effective date of the North Dakota statute the appellant owned and held real estate of the character specified in the statute. This real estate was not necessary in the conduct of its business. It was agricultural land, and under the provisions of the statute, the corporation was required to dispose of it within ten years from the effective date of such statute.

Corporations are organized for the purpose of carrying on certain business activity authorized by their charter. They are granted powers to be used in the performance of the functions for which they are organized. As was said in the North Dakota case, Asbury Hospital v. Cass County, et al., 72 N. D. 359, 7 N. W. 2d 438: (R 41)

> "There is an obvious distinction between the objects or business which a corporation is organized to accomplish or conduct and the powers with which it is vested for the purpose of conducting the business or attaining its objects. When the statute provides that there shall be excepted from its operation such real estate as is reasonably necessary in the conduct of the business of a corporation, it means such real estate as is reasonably necessary for carrying on the business or activity which the corporation was created to carry on. 6 Fletcher, Cyc. Corp. pp. 170, 171, Section 2475; 17 Fletcher, Cyc. Corp. pp. 471-474; General Conference vs. Berkey, 156 Cal. 466, 105 P. 411; Major Creek Lumber Co. vs.

Johnson, 99 Or. 172, 195 P. 177; Alpena Portland Cement Co. vs. Jenkins & R. Co. 244 Ill. 354, 91 N. E. 480; Friedlander Bros. vs. Deal, 218 Ala. 245, 118 So. 508."

It will be seen, therefore, that there is a clear distinction between the purposes for which a corporation is organized, and the powers that it may exercise. It may have the power to do certain things which are not a part of the business which it was authorized to conduct under the provisions of its charter. 17 Fletcher, Cyc. Corp. pp. 471-474.

The case of General Conference v. Berkey, 156 Cal. 486, 105 Pac. 411, we believe is squarely in point on this proposition. The General Conference of Free Baptists was a foreign corporation organized under the laws of Maine. It owned a lot in the city of Sacramento which it sold. The question raised was whether the sale of this lot constituted "transacting business" or "doing business" by the General Conference of Free Baptists in the state of California. We quote from the opinion of the court:

> "It remains to be considered, then, whether a sale of real estate by such a corporation is a transaction of business by it within the meaning of the constitutional provision above referred to. The phrase 'to transact business,' as used in this provision, is equivalent to the words 'to do business,' found in the statutes of many states, prohibiting a foreign corporation from 'doing business' in such states until it has filed a certificate designating a place of business and a resident agent upon whom process may be served, or complied with other conditions, **** 'This corporation was certainly not engaged in the busi-

ness of buying and selling land. As we have said, in another connection, its charter plainly indicates that the power conferred upon it to make such purchase and sale was not granted for the purpose of enabling it to do such acts as a means of making a profit thereon. The buying and selling permitted to it were merely incidental to the carrying on of the main purposes of the corporation. A distinction is to be drawn between the purposes of a corporation and its powers (Floyd vs. Perrin, 30 S. C. 1, 12, 8 S. E. 14, 2 LRA 242). The purposes of the plaintiff, as defined in the articles of incorporation, are 'religious, missionary, educational and charitable.' As incidental to these purposes, it is granted a variety of powers, i. e., the power to prosecute and defend suits at law, the power to use a common seal, the power to take and hold for the objects of said corporation any real or personal property, and the power to sell and convey any estate which the interests of the corporation may require to be sold and conveyed. All of these powers are to be exercised in subordination to the main purposes as first declared. The purchase and sale of property by such a corporation is not one of the ends for which it is organized, but is merely a means to enable it to accomplish those ends. Property is to be acquired only for the objects of the corporation, and to be sold only when the interests of the corporation require such sale. The power to sell property by a corporation of this character is as purely incidental to the prosecution of its main purposes as are the other powers enumerated in the charter, as, for example, the power to

prosecute and defend suits at law. It is quite generally held that the mere prosecuting or defending of suits by a foreign corporation is not 'doing business,' within the meaning of statutes of the kind we have been discussing."

Appellant's second contention under Point I is that the North Dakota law deprives it of the use if its property during the period from the time of escheat to the date of public sale by the county. It is the contention of the appellees that the provision of the statute that such real estate shall escheat to the county is not intended to deprive the corporation of the benefits derived from the land during the period mentioned. The county is not bringing the escheat proceedings on the theory that the corporation is indebted to the county upon any account or tax, or other obligation. The escheat proceedings are entirely different from county tax deed proceedings where counties, through statutory preceedings, take title to real property for the purpose of collecting delinquent taxes. The purpose of the escheat proceedings is simply to give the county title and possession to enable it, upon sale thereof, to give a good and sufficient title to the purchasers. The proceedings will be had in courts having equitable jurisdiction, and it is fundamental that a court of equity will protect the right of any person or corporation involved in any matters or in any controversy before it, and in which it has jurisdiction. Furthermore, the land will be sold at public auction to the highest bidder. There is nothing in the statute which would prevent the corporation from being a purchaser at the sale at a price which it considers the reasonable value of the property.

The time that may elapse between the judgment of escheat and the sale of the property involved cannot

exceed one year, and the presumption is that the sale will be had and will be completed within that time. Undoubtedly if there are growing crops upon the premises involved, accounting of same will be made to the corporation whose land was sold because, as we have pointed out, the escheat proceedings are not brought for the purpose of collecting a debt or enforcing a financial obligation from the corporation to the county. As a matter of law, the corporation is entitled only to the value of the property, and when the value in money has been paid to the corporation it can have no further legal claim.

It is the contention of the appellees, therefore, that the effect of escheat proceedings does not deprive the appellant of due process guaranteed by the Constitution. As was said in the case of Asbury Hospital v. Cass County, et al., 72 N. D. 359, 7 N. W. 2d 438: (R. 54)

> "The statute does not purport to divest a corporation of title to land which it holds beyond the prescribed period: It makes such holding the ground for an action to effect the escheat; but the corporation continues to own and hold the property until title thereto is divested by judgment rendered in the action brought pursuant to the statute. 19 Am. Jur. 399, Sec. 33. The corporation must be made a party to the action. It will have full opportunity to be heard in defense. It goes without saying that judgment to effect escheat may be rendered only if the cause of action is established. If the cause is established and judgment to effect ascheat, rendered, the county must dispose of the land within one year 'at public auction to the highest bidder' and the proceeds of the sale, after payment of expenses

of the action and of the sale, must be paid to the corporation. It is true the statute does not prescribe the form of notice of sale, or the manner of publication thereof; but it does require sale to be made within a year, and that the sale be a public one. (The sale is predicated upon the judgment effecting the escheat). The corporation has a direct interest in the sale, and the court has the power to protect the rights of the corporation as to the notice and conduct of the sale, by appropriate provisions in its judgment. Greenwood vs. Union Freight R. Co. 105 U. S. (15 Otto) at page 19, 26 L. Ed. at page 964; Church of Jesus Christ of L. D. S. vs. United States, 136 U. S. 1, 34 L. Ed. 478, 10 S. Ct. 792."

Appellant's third contention under Point I is that the ten year period provided in the act for the disposal of lands was, under the conditions as they existed, so inadequate as to amount to confiscation.

In support of this contention appellant refers to the economic situation during that ten year period, and contends that such economic condition depressed the market value of lands to such an extent as to render it practically impossible for corporations to dispose of their lands at anything like their actual value within the ten year period; that, therefore, the application of the statute would deprive the appellant, and other corporations similarly situated, of property without due process of law.

This argument, however, is untenable. Economic conditions may some times render the operation of a law oppressive, but that fact alone does not violate constitutional inhibitions. It is elementary that the validity of a statute must be determined solely upon the question

whether it is within the purview of legislative powers as limited by Federal and State Constitutions. 11 Am. Jur. 803, 16 C. J. S. pp. 471 et seq.; State ex rel. Linde vs. Taylor, 33 N. D. 76, 156 N. W. 561, LRA 1915B, 156.

It is fundamental that the justice, wisdom, necessity, utility or expediency of a law which is within their powers are for the lawmakers. 11 Am. Jur. 803, 804 et seq., 16 C. J. S. pp. 471 et seq.

The operation of a statute may temporarily create oppressive conditions, but it cannot be held invalid on that ground, unless its provisions contravene the State or Federal Constitution. As stated in 1 Cooley, Const. Lim. 8th ed. p. 345, "The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance." In the case of Lommen vs. Minnesota Gaslight Co. 65 Minn. 196, 208, 68 N. W. 53, 54, the court said, "The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the people themselves, or their legislative representatives."

On pages 30 and 31 of appellant's brief, we find the following statement:

> "It is a demonstrable fact that during the period from July 1932, corporations have not been able to dispose of their lands. It has been economically impossible for them to do so.
>
> North Dakota farmers have not been prevented from acquiring land, even at ridiculously low figures during the last decade.
>
> We learn from a report of the Works Progress Administration that there are potential

county lands (with five or more years' taxes delinquent) in the amount of 7,333,678 acres. That there are already county tax deeds for 2,106,103 acres and that the lands owned by the Bank of North Dakota and the Board of University and schools bring the total amount of such lands up to 13,258,021 acres. This huge reservoir of good land could be acquired by the farmers of North Dakota at very low prices."

Marginal references are then made to reports from the United States Department of Agriculture giving statistics showing relative sales in North Dakota as compared with the United States as a whole.

Statistics referring to the economic depression of the early thirties cannot avail as a legal argument to establish that the law challenged is invalid. However, since reference has been made to the economic depression of that period, it can also be shown by other statistics that from the year 1938 and on there has been a steady upward trend in the sale of lands in the state of North Dakota.

The University and School Land Department of the state of North Dakota had in the years prior to 1925 acquired considerable quantities of land through mortgage foreclosures, the result of loans made to farmers, secured by farm mortgages. A report of that department shows that prior to July 1, 1942 it had sold 1,411 farms, a total of 306,035 acres, at the price of $4,476,227. The average price per acre was $14.62. Some farms were sold for a lesser price per acre while other farms were sold for more, depending, of course, upon the locality of the land.

From the year 1919 and up to the year 1924 or 1925 the real estate loan department of the Bank of North

Dakota had acquired considerable quantities of land through mortgage foreclosures, resulting from loans made to farmers secured by farm mortgages. The report of the Land Department of the Bank of North Dakota for the year ending December 31, 1940 shows that during that year it sold 864 farms, a total of 199,578 acres, at the price of $1,802,860. The average price per acre was $14.23. Some farms brought as high as $22 an acre, the price, of course, depending upon the quality and location of the land.

The report of the department for the fiscal year ending June, 1942 shows that during that year the Bank sold 1,589 farms containing 388,475 acres at a sales price of $3,716,231. The average price per acre was $9.57, although some farms brought prices as high as $23, $20 and $17 per acre, depending upon the quality and location of the land.

The report of the same department for the year ending June 30, 1944 shows sales of 1,050 farms containing 248,933 acres at a sales price of $2,610,311. The average price per acre was $10.48, while some parcels were sold for a trifle less than the average, some parcels brought as high as $23 per acre. It is common knowledge that at the present time there is a great demand in the state for farm lands, and that there is a distinctive upward trend in land values in the state.

In its fourth contention under Point I the appellant contends that the North Dakota statute discriminates against it and in favor of corporations which acquired land by purchase after July, 1932, and deprives it of the equal protection of the law within the meaning of the 14th Amendment. On page 41 of appellant's brief appears this statement: "Corporations which acquire land by purchase after July, 1932 are not affected by

the law at all and may continue to hold such land without limitation or restriction indefinitely. This is obvious from a reading of the act."

The foregoing certainly is an erroneous statement of the provisions of the statute under consideration. Undoubtedly counsel for appellant has overlooked Section 10-0605 of the Act, which provides as follows:

> "The title and ownership of any real estate **acquired in any manner** by any domestic or foreign corporation since the approval and adoption of the initiated law of June 29, 1932 shall be valid for all purposes notwithstanding any provisions in said initiated law contained, **subject, however, to all of the provisions now contained in this chapter.**"

We direct the court's attention to the following language in the statute: "The title and ownership of any real estate **acquired in any manner** by any domestic or foreign corporation since the approval and adoption of the initiated law", and further, "**subject, however, to all of the provisions now contained in this chapter.**"

We fail to see how this language can be misunderstood because real estate acquired in any manner by corporations, domestic or foreign, are subject to all of the provisions now in the Act, and it provides specifically that all corporations, both domestic and foreign, which now own or hold rural real estate which was acquired prior to July 29, 1932 (Section 10-0602), and any corporation, domestic or foreign, which on or since July 1932 has acquired or hereafter shall acquire any rural real estate, (Section 10-0603), shall dispose of such real estate, except such as is reasonably necessary in the conduct of its business, within ten years from the date that it was so acquired.

The statute provides in clear, understandable English that it shall apply with like effect to all corporations acquiring property, both prior and subsequent to the effective date of the Act, since it specifically provides that the title and ownership of any real estate **acquired in any manner** by any domestic or foreign corporation since the approval and adoption of the Act shall be subject to all of the provisions now contained therein.

That the law applies with equal force to corporations acquiring land prior to the effective date of the Act, and subsequent thereto, cannot be expressed in language more clear and specific than that employed in the statute. It seems to us that further comment upon this feature of the law is entirely unnecessary.

We wish to call attention here to the fact that this point was not raised in the court below, and, therefore, in any event it is not an issue before this court.

Counsel further contends that under the exception in the statute corporations primarily formed for the purpose of acquiring, holding and dealing in land may freely do so without limitation or restriction because such corporations fall squarely within the exception written into the statute.

This point was not raised in the court below, and we fail to see how it can be an issue in the case at bar. However, the purpose of the statute is stated in Section 10-0601:

> "All corporations, both domestic and foreign, except as otherwise provided in this chapter, are hereby prohibited from engaging in the business of farming or agriculture."

It is clear that the purpose and intent of the statute is to prohibit corporations, both domestic and foreign,

from engaging in the business of farming or agriculture — that is, a corporation, whether domestic or foreign, may not engage in farming or agriculture as a business but the statute does not prohibit such a corporation from engaging in the business of buying and selling real estate.

The underlying purpose of the statute was to prohibit corporations from acquiring large areas of land and in effect create a monopoly to the detriment of individual farmers. North Dakota is an agricultural state, and the principal occupation of its citizens is farming and agriculture, and the purpose of the legislature in enacting this statute was to encourage individual citizens in acquiring and improving farms and establishing farm homes and the building up of prosperous rural communities.

We respectfully submit that the question as to whether corporations may engage in real estate business that is in the buying and selling of farm lands—is entirely beside the point and is not an issue here; but even if it were an issue, we do not see how the appellant could be prejudiced thereby because it is not engaged in a business which would bring it into competition with the class of corporations of which it complains.

The appellant next complains that Section 5 of the Act, that is Section 10-0604, permits cooperative corporations, seventy-five per cent of whose members or stockholders are actual farmers residing on farms or depending principally on farming for their livelihood, to acquire and hold real estate without limitation.

Long before the appellant acquired any land in North Dakota the state had in effect entirely separate

statutory provisions for the organization and control of ordinary corporations and for the organization of cooperative associations or corporations.

Chapter 10-02 of the North Dakota Revised Code of 1943 deals with the organization and perpetuation of ordinary corporations as that term is generally understood.

Chapter 10-15 of the North Dakota Revised Code of 1943 deals with the organization of cooperative associations or corporations.

We do not believe, therefore, that upon the facts and the record in this case the appellant is in position to raise the issue of discrimination between itself and cooperative associations or corporations. There is nothing in the record and facts of the case from which it would appear even remotely that the appellant is in any way prejudiced or at a disadvantage because cooperatives are exempted from the operation of the statute.

It is an elementary rule repeatedly announced with practical unanimity by the courts of the land, including the Honorable Supreme Court of the United States, that a person may question the constitutionality of a statute only when and insofar as it is sought to be applied to his disadvantage. Rindge Co. vs. Los Angeles County, 262 U. S. 700, 67 L. ed. 1186, 43 S. Ct. 689; Minot Special School Dist. vs. Olsness, 53 N. D. 683, 686, 208 N. W. 968, 45 ALR 1337; Premier-Pabst Sales Co. vs. Grosscup, 298 U. S. 226, 80 L. ed. 1155, 56 S. Ct. 754; Henneford vs. Silas Mason Co. 300 U. S. 577, 81 L. ed. 814, 57 S. Ct. 524; 16 CJS pp. 161, 162. "One attacking the constitutionality of a statute is not the champion of any rights except his own." Henneford vs. Silas Mason Co. supra.

We quote further from 16 CJS pp. 161, 162:

> "One may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right."

We quote also from Premier-Pabst Sales Co. vs. Grosscup, 298 U. S. 226, 80 L. ed. 1155:

> "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him."

We quote also from the opinion of the North Dakota Supreme Court in the case of Asbury Hospital v. Cass County, et al., 72 N. D. 359, 7 N. W. 2d 438 (R. 58):

> "The plaintiff is not a co-operative corporation. It is not engaged in farming or agriculture. It cannot be injured by the provisions of the statute which discriminates in favor of co-operative corporations '75 per cent of whose members or stockholders are actual farmers, residing on farms or depending principally on farming for their livelihood,' and against co-operative corporations 75 per cent of whose members or stockholders are not 'actual farmers, residing on farms or depending principally on farming for their livelihood.' According to

the allegations of the plaintiff's complaint, injury is threatened to it only under the provisions which required corporations who had acquired rural real estate, used or usable for farming, at or prior to the effective date of the statute, to dispose of such real estate within ten years thereafter."

We quote also from the case of German Alliance Ins. Co. vs. Lewis, 233 U. S. 389, 58 L. ed. 1011, in which the Supreme Court of the United States was considering whether the exemption of Farmers Mutual Ins. Companies from a law applying to another insurance company made the act discriminatory. The court said:

"The distinction is therefore between co-operative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of co-operative companies, and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. Ozan Lumber Co. v. Union County Nat. Bank, 202 U. S. 623, 50 L. ed. 1176, 26 Sup. Ct. Rep. 768. There are cer-

tainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281."

It clearly appears, therefore, that appellant's contention that the exception in favor of cooperatives is discriminatory is absolutely without merit and has no bearing upon the issues in this case.

POINT II

In the second point of its arguments appellant contends that the statute challenged impairs the obligation of contract within the meaning of Article 1, Section 10, of the Constitution of the United States.

The contention is made that since the appellant acquired the land prior to the enactment of the challenged statute, it did so without limitation or restriction of any kind; that it acquired vested contract rights and that such contract rights are impaired by the application of the law.

We fail to see any force or merit to this contention. As has been pointed out in other portions of this brief, the appellant is a Minnesota corporation, and its charter was issued by that state. It was organized for religious and charitable purposes solely. It had no other rights than those granted to it by the Minnesota charter.

The fact that it acquired land in North Dakota by comity or acquiescence gave it no vested rights. It was bound to take notice of the Constitution and statutes of the state of North Dakota and its reserved powers

that it might exercise with reference to the rights and privileges of foreign corporations. No implied contract could result from the fact that it was permitted to take title to land, and, therefore, it could not complain of impairment of any vested rights or impairment of contract obligations under Article 1, Section 10, of the Federal Constitution.

Counsel for appellant cites the cases of Herndon v. Chicago Rock Island Pac. Ry. Co., 218 U. S. 135, 54 L. ed. 970, and Western Union Tel. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355. Neither of these cases are in point. The case of Western Union Tel. Co. v. Kansas, supra, has been previously discussed in this brief.

Both cases involved statutes placing undue burden upon interstate commerce, and no such question is present in the instant case.

We believe the following statement from the opinion of the Supreme Court of the state of North Dakota in the case of Asbury Hospital v. Cass County, et al., 72 N. D. 359, 7 N. W. 2d 438 (R. 58), is directly in point:

> "The plaintiff also contends that the statute is violative of Sec. 2 of Article 4 of the Constitution which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' This contention is clearly devoid of merit. It is settled beyond controversy that a corporation is not a citizen within the meaning of Sec. 2 of Article 4, of the Federal Constitution or of Sec. 1 of Article 14 of the Amendments to the Federal Constitution as to the privileges and immunities of citizens. Orient Ins. Co. vs. Daggs, 172 US 557, 43 L.

Ed. 552, 19 S. Ct. 281, supra; Waters-Pierce Oil Co. vs. Texas, 177 US 28, 45, 44 L. Ed. 657, 664, 20 S. Ct. 518; 12 Am. Jur. 100, 23 Am. Jur. 259, 8 Fletcher, Cyc. Corp. p. 449."

CONCLUSION

Briefly stated, the appellant contends that the provision in the North Dakota corporation farming statute to the effect that in cases of failure of a corporation to dispose of its land within ten years from the effective date thereof, the land shall escheat to the county through judicial proceedings for the purpose of disposing of it at public sale, deprives the corporation of its property without due process of law and impairs vested contract rights, notwithstanding payment to the corporation of the proceeds and its right to be a bidder at the sale.

Appellant further contends that the statute is discriminatory in that it exempts from its operation cooperative corporations and associations, seventy-five per cent of whose members or stockholders are actual farmers residing on farms or depending principally upon farming for their livelihood, and, therefore, is violative of the equal protection clause of the Federal Constitution, notwithstanding such cooperatives in no way competes with the appellant in its business.

We submit that the appellant has failed to establish any of the foregoing contentions, and that the record and facts in this case clearly show that none of its constitutional rights have been violated.

The claim of the appellant that its rights have been violated hinges upon the question whether or not the escheat proceedings by the county resulting in a judg-

ment providing for the sale of the land at public sale constitutes taking property without due process of law. When a public sale is had under judicial proceedings ordered by a court of equity, the rights of interested parties are protected, and the price received at the sale is the reasonable market value of the property sold.

When, therefore, the proceeds of the sale have been paid to the owner, such owner has been compensated as a matter of law. The property has been exchanged for its monetary value according to the prevailing market price, and the owner has no further interest therein.

It is conceded that the land acquired by the appellant in North Dakota was not necessary in the conduct of its business under its charter granted by the state of Minnesota. It had no rights under any contract, expressed or implied, with the state of North Dakota. When the appellant acquired land in North Dakota, it did so subject to the provisions of its Constitution and laws, and the reserved power to enact regulatory statutes dealing with corporations, domestic and foreign. It is conceded that appellant acquired its land in North Dakota for investment only, and it requires no refined reasoning to establish that such investments are subject to such laws and regulations as the legislature may see fit to make.

We respectfully submit that the appellant has failed to establish that the North Dakota corporation farming statute is violative of any rights guaranteed to it by Article 1, Section 10, of the Constitution of the United States, or Section 1 of the 14th Amendment, and that, therefore, the decision of the Supreme Court

of the state of North Dakota in the premises should in all things be affirmed, and appellant's appeal dismissed.

Respectfully submitted,

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APPENDIX

CHAPTER 10-06

CORPORATE FARMING LAW

Section

10-0601 Farming by domestic and foreign corporations prohibited.

10-0602 Disposal of agricultural lands; ownership limitation covenant running with land.

10-0603 Disposal of lands acquired subsequent to July 29, 1932; ownership limitation a covenant.

10-0604 Cooperative corporations exempted; when.

10-0605 Title to farm lands acquired by corporation since July 29, 1932 valid.

10-0606 Land of noncomplying corporation sold by county; proceeds paid to corporation.

"10-0601. FARMING BY DOMESTIC AND FOREIGN CORPORATIONS PROHIBITED. All corporations, both domestic and foreign, except as otherwise provided in this chapter, are hereby prohibited from engaging in the business of farming or agriculture."

"10-0602. DISPOSAL OF AGRICULTURAL LANDS; OWNERSHIP LIMITATION COVENANT RUNNING WITH LAND. All corporations, both domestic and foreign, which now own or hold rural real estate which was acquired prior to July 29, 1932 and which is used or usable for farming or agriculture, except such as is reasonably necessary in the conduct of their businesses, shall dispose of the same on or before July 29, 1942, and said corporations may farm and use said real estate for agricultural purposes until such date. The ownership limitation provided by this section shall be deemed a covenant running with the title to the land against any grantee, successor, or assignee of a corporation, which is also a corporation."

"10-0603. DISPOSAL OF LANDS ACQUIRED SUBSEQUENT TO JULY 29, 1932; OWNERSHIP LIMITATION A COVENANT. Any corporation, either domestic

or foreign, which, on or since July 29, 1932, has acquired or hereafter shall acquire any rural real estate, used or usable for farming or agriculture, by judicial process or operation of law or pursuant to section 10-0605, shall dispose of such real estate, except such as is reasonably necessary in the conduct of its business, within ten years from the date that it was so acquired. During said ten year period, the corporation may farm and use such lands for agricultural purposes. The ten year limitation provided by this section shall be deemed a covenant running with the title to the land against any grantee, successor, or assignee of such corporation, which also is a corporation."

"10-0604. COOPERATIVE CORPORATIONS EXEMPTED; WHEN. Nothing in this chapter shall be construed to prohibit cooperative corporations, seventy-five per cent of whose members or stockholders are actual farmers residing on farms or depending principally on farming for their livelihood, from acquiring real estate and engaging in cooperative farming or agriculture."

"10-0605. TITLE TO FARM LANDS ACQUIRED BY CORPORATION SINCE JULY 29, 1932 VALID. The title and ownership of any real estate acquired in any manner by any domestic or foreign corporation since the approval and adoption of the initiated law of June 29, 1932 shall be valid for all purposes notwithstanding any provisions in said initiated law contained, subject, however, to all of the provisions now contained in this chapter. It shall be lawful for any corporation, domestic or foreign, subject to the other provisions of this chapter, to take and acquire title to real estate by deed or other conveyance where such deed or conveyance is taken or given in exchange for lands acquired prior to March 7, 1935 or in partial or in full satisfaction of any mortgage, lien, or other encumbrance held or owned by such corporation on such real estate. Any and all deeds and conveyances of real estate taken by any corporation prior to March 7, 1935, either in exchange for lands theretofore acquired or in partial or in full satisfaction of any

mortgage, lien, or other encumbrance on such real estate, shall be valid for all purposes."

"10-0606. LAND OF NONCOMPLYING CORPORATION SOLD BY COUNTY; PROCEEDS PAID TO CORPORATION. In case any corporation, either domestic or foreign, violates any provision of this chapter or fails, within the time fixed by this chapter, to dispose of any real estate to which it has acquired title and which is not reasonably necessary for the conduct of its business, then title to such real estate shall escheat to the county in which such real estate is situated upon an action instituted by the state's attorney of such county, and such county shall dispose of the land within one year at public auction to the highest bidder, and the proceeds of such sale, after all expenses of such proceedings shall have been paid, shall be paid to the corporation which formerly owned the land."

SUPREME COURT OF THE UNITED STATES.

No. 35.—October Term, 1945.

Asbury Hospital, a Corporation, Appellant, vs. Cass County, North Dakota, a Public Corporation, R. F. Croal, as States Attorney of Cass County, North Dakota, et al.	Appeal from the Supreme Court of the State of North Dakota.

[November 5, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Appellant, a Minnesota non-profit corporation, sought, in the state district court of North Dakota, a declaratory judgment that the so-called Initiative Measure of 1932, North Dakota Laws, 1933, pp. 494, 495, as amended by Chap. 89, Laws 1933, and Chap. 111, Laws 1935, is unconstitutional as applied to appellant's North Dakota farming lands.

The challenged statute declares, §§ 2, 3, that corporations, both domestic and foreign, which "now own or hold rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years from the date that this Act takes effect . . .", and that "the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." Farming land in the state owned by any corporation in violation of the statute is, by § 5, made subject to escheat to the county in which it is located, by suit instituted by the county attorney. The county is required to dispose of the land at public auction to the highest bidder within one year after escheat, and to pay the proceeds, less the expenses of sale, to the former corporate owner.

Appellant alleges in its amended complaint that prior to the enactment of the statute it had acquired a tract of land within Cass County, North Dakota, in satisfaction of a mortgage indebtedness, and that it has since leased the property out to farmers who have used it as farm land. The amended complaint fur-

ther alleges that since the enactment of the statute appellant has constantly attempted to sell this tract, and that it has been and will be unable to sell it for an amount equal to the original mortgage debt before the expiration of the statutory ten year period; that any sale which the county, proceeding under the statute, might be able to make, would be for substantially less than the amount appellant has invested in the land and the costs of sale. The amended complaint sets up that the statute, as applied to appellant's tract, violates the privileges and immunities clauses of Article IV, § 2 and the Fourteenth Amendment of the Federal Constitution, the contract clause, Article I, § 10, and the due process and equal protection clauses of the Fourteenth Amendment, and prays for a judgment that the statute is unconstitutional and void as applied to appellant and for an injunction restraining respondent county from enforcing the statute.

The Supreme Court of North Dakota sustained an order of the trial court overruling appellee's demurrer to the amended complaint, 72 N. D. 359. Upon remand of the case for further proceedings, the trial court found the allegations of fact set out in the amended complaint to be true, construed the statute as applicable to appellant's land, which was held not to be necessary to the conduct of appellant's business, and sustained the constitutionality of the statute in all respects. The Supreme Court of North Dakota affirmed. — N. D. —, 16 NW 2d 513. The case comes here on appeal under § 237(a) of the Judicial Code, 28 U. S. C. 344(a), appellant repeating in its assignments of error the attack made on the statute by its complaint.

Appellant does not invoke the commerce clause, and is neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment. *Paul* v. *Virginia*, 8 Wall. 168, 177; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 187; *Selover, B. & Co.* v. *Walsh*, 226 U. S. 112, 126. The State of North Dakota has granted no charter or certificate of incorporation to appellant, and has issued to it no permit to do business or own property within the state which could give rise to contract rights which appellant could assert against the state. None are to be implied from appellant's mere acquisition of land in the state either before or after the enactment of the statute. *Erie Ry. Co.* v. *Pennsylvania*, 21 Wall. 492; *Connecticut*

Mutual Life Ins. Co. v. *Spratley*, 172 U. S. 602, 620-622; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 344-5.

The Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it. *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 312-315; *Hooper* v. *California*, 155 U. S. 648, 652; *Munday* v. *Wisconsin Trust Co.*, 252 U. S. 499; *Crescent Oil Co.* v. *Mississippi*, 257 U. S. 129, 137. While recognizing the unqualified power of the state to preclude its entry into the state for these purposes, appellant points out that the state has permitted it to enter and to invest its money in obligations secured by mortgage on land within the state, in consequence of which it lawfully acquired the land free of restrictions. Appellant argues that the state may not, by later legislation, force a sale of the land thus innocently acquired, under conditions which do not allow recovery of the original investment. But a state's power to exclude a foreign corporation, or to limit the nature of the business it may conduct within the state, does not end as soon as the corporation has lawfully entered the state and there acquired immovable property. Subsequent legislation excluding such a corporation from continuing in the state has been sustained as an exercise of the general power to exclude foreign corporations which does not offend due process. *Hammond Packing Co.* v. *United States*, 212 U. S. 322, 342-3; see also *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 83. Similarly, this Court has upheld legislation imposing burdens greater than those to which such corporations were subject at the time of their entry on the ground that the state might exclude them altogether at a later date. *Phila. Fire Association* v. *New York*, 119 U. S. 110; *Horn Silver Mining Co. v. New York*, *supra*; see also *Crescent Oil Co.* v. *Mississippi*, *supra*; *Lincoln National Life Ins. Co.* v. *Read*, 1944 Term, decided June 11, 1945. Appellant, even if its activities in North Dakota are now restricted to the ownership of farm land within the state, stands in no better position to invoke the protection of the Fourteenth Amendment. The total exclusion of a corporation owning fixed property within a state requires it to sell or otherwise dispose of such property. Appellant must do no more. While appellant is not compelled by the present statute to cease all activities in North Dakota, the greater power includes the less.

Since the st e may validly require appellant to sell its farm land, the contention that the statute is wanting in due process because conditions have been such since its enactment that appellant has been and will be unable to salvage an investment made more than ten years before raises no substantial constitutional question. The due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its cost. It is enough that the corporation, in complying with the lawful command of the state to part with ownership, is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calculated to realize its value at the time of sale. No reason is advanced for saying, and we cannot say that the period of ten years allowed to appellant to dispose of the property, or its sale after ten years at public auction held under direction of the court and comparable generally to a mortgage foreclosure sale, fails to satisfy either of these conditions. As the North Dakota Supreme Court pointed out in its opinion, the statutory escheat of appellant's land is effected by suit to which the corporation must be a party, with full opportunity to be heard in advance. The judgment of sale in conformity to the statute is entered by the court which "has the power to protect the rights of the corporation as to the notice and conduct of the sale by appropriate provisions in its judgment."

Appellant makes the further objection that the statute denies due process because it deprives him of the possession of the property during the period from the time of escheat to the date of public sale, and makes no provision for any accounting for the rents and profits of the land during that period. The state's Attorney General argues that in the escheat proceeding the court has power to require and will require such an accounting. The record does not disclose that this objection was raised or considered by any court in the course of the present suit, or that any state court has construed the statute so as to determine whether a corporation whose land has been escheated will be deprived of the rents and profits pending the sale.

We are thus asked to pass on the constitutionality of a possible application of the state statute in advance of its application to appellant, and of its authoritative construction by the state courts.

Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied. *Alabama State Federation of Labor* v. *McAdory*, No. 588, October Term 1944, decided June 11, 1945, slip opinion, pp. 6-8, and cases cited.

Only two of the equal protection contentions which appellant presses here appear to have been presented to or considered by the state courts. The North Dakota Supreme Court held that the statute's exception from its operation, of lands owned and held by corporations whose business is dealing in farm lands, (§ 2), and of the lands belonging to cooperative corporations, seventy-five percent of whose members or stockholders are farmers residing on farms, or depending principally on farming for their livelihood, (§ 4), did not deny the equal protection claimed. We agree.

The legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Metropolitan Company* v. *Brownell*, 294 U. S. 580, 583, and cases cited. We cannot say that there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a state policy against the concentration of farming lands in corporate ownership.

The North Dakota Legislature may have thought that its policy with reference to corporate owned agricultural lands would be advanced by permitting corporations engaged in the business of dealing in farm lands to acquire and sell without restriction lands forced upon the market by the statute. It could have thought that its policy would be in part defeated by withholding authority from farm cooperatives to acquire and use farm lands for agricultural purposes. Cf. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 562-564. Statutory discrimination between classes which are

in fact different must be presumed to be relevant to a permissible legislative purposes, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 509, and cases cited.

Appellant also asserts that the statute imposes an unconstitutional discrimination because §§ 2, 3 provide that any corporation which acquired farm land in any manner prior to 1932 the effective date of the Act, or by judicial process or operation of law thereafter, is required to dispose of it within the ten year period, while a corporation which acquired land by deed or grant after 1932 may hold it without restriction. But § 4, as amended by Chapter 89 of the North Dakota Laws of 1933, provides: "That the title and ownership of any real estate acquired, in any manner, by any domestic or foreign corporation, since the approval and adoption of the aforesaid initiated law, is hereby declared to be legal and valid for all purposes, notwithstanding any provisions in said initiated law contained, but subject however, to all of the provisions now contained in said initiated law as hereby amended and reenacted."

This section was not construed by any state court in the present litigation and we are not advised why farming lands acquired in conformity to § 4 are not, as the section declares, made "subject . . . to all of the provisions now contained" in the Act as amended, including those relating to the escheat and sale of farming lands. Nor does it appear that any such discrimination is in fact made in the enforcement of the statute. As we have already pointed out in this opinion, a constitutional question which turns on the construction and application of a statute which has neither been authoritatively construed nor applied by the state courts may not appropriately be decided by this Court. *Alabama State Federation of Labor* v. *McAdory*, *supra*, and cases cited.

The North Dakota Supreme Court, in its opinion, and counsel, in brief and argument here, confined their discussion to the question whether the state's powers over a foreign corporation as such justify the compulsory disposition of its farm land within the state. We need not, for present purposes, have recourse to other possible sources of state power to control the ownership and

disposition of property lying within its borders. We have considered but find it unnecessary to discuss other arguments of lesser moment.

We dismiss the appeal insofar as it draws in question the constitutionality of the act for its alleged failure to require an accounting for rents and profits of the land in the interval between the judgment of escheat and the sale of the land, and insofar as North Dakota farming lands acquired by corporations by deed or grant subsequent to 1932 are said to be exempted from the operation of the statute. In all other respects the judgment is affirmed.

So ordered.

Mr. Justice BLACK is of the opinion that the appeal should be dismissed for want of a substantial federal question.

Mr. Justice JACKSON took no part in the consideration or decision of this case.